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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

POLICE PENSION AND RELIEF BOARD and EDWARD O. GEER (substituted for Charles J. Lowen), JAMES T. O'DONNELL, DUANE BORDEN, TIMOTHY CROW (substituted for Harry Brofman, Harold L. Dill, and Morris A. Pade), and IVAN ELDHER AS MEMBERS THEREOF; THOMAS G. CURRIGAN (substituted for William H. McNichols) AS AUDITOR of the City and County of Denver; and the CITY AND COUNTY OF DENVER, a municipal corporation;

Petitioners,

vs.

CHARLES BEHNKE, ARTIE D. DAVIS, RAYMOND W. FELL, and FRANK G. KNAUS, on behalf of themselves and ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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IN THE

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OCTOBER TERM, 1957

NO. .....

POLICE PENSION AND RELIEF BOARD, et al.,
Petitioners,

vs.

CHARLES BEHNKE, et al., etc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Police Pension and Relief Board and Edward O. Geer, James T. O'Donnell, Duane Borden, Timothy Crow, and Ivan Eldher as members thereof, Thomas G. Currigan as Auditor of the City and County of Denver, and the City and County of Denver, a municipal corporation, by John C. Banks and Horace N. Hawkins, Jr., their attorneys, pray that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Colorado rendered, entered, and filed on October 14, 1957 modifying, and affirming as modified, a judgment of the District Court of the City and County of Denver. Petition for rehearing aptly filed by petitioners here, who were plaintiffs in error in the Supreme Court of Colorado, was denied on November 12, 1957, and the judgment of the Supreme Court of Colorado became final on that date.

OPINIONS DELIVERED IN THE COURTS BELOW

The trial court, the District Court of the City and County of Denver, rendered a "memorandum opinion" which appears in the record filed herein at pages 39 through 47; it is unreported, but is printed as Appendix A to this petition.

The opinion of the Supreme Court of Colorado, rendered October 14, 1957 (petition for rehearing denied November 12, 1957), is not yet officially reported in the Colorado reports, but is reported in No. 4 of the Pacific Reporter Advance sheets for 316 P. 2d, dated November 29, 1957, at page 1025; this opinion is also printed as Appendix B to this petition.

No opinion was rendered by the Supreme Court of Colorado on denial of the petition for rehearing.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The date of the judgment of the Supreme Court of Colorado sought to be reviewed, and the time of its entry, was and is October 14, 1957 (Record, Page 87).

(ii) Petition for rehearing filed in apt time and on October 29, 1957 (Record, Pages 88-94) was denied on November 12, 1957 (Record, Page 95), on which date the judgment became final. No order granting an extension of time within which to petition for certiorari has been requested or entered.

(iii) The statutory provisions conferring jurisdiction on this court to review the said judgment in question by writ of certiorari are (a) Title 28 United States Code Annotated Section 1257, providing that final judgments rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where any title, right, or privilege is specially set up or claimed under the Constitution of the United States, and (b) Title 28 United States Code Annotated Section 2161, providing that any writ of error intended to bring any judgment in a civil action before the Supreme Court for review shall be applied for within ninety days after the entry of such judgment.

QUESTIONS PRESENTED FOR REVIEW

1. When the Supreme Court of a state wherein the

established law is that judicial notice is not taken of city ordinances, in deciding a given case and, in its own words, without "waiving or sanctioning failure to plead and prove ordinances relied upon," admits, again in its own words, that because of public interest in the matters presented, "we have taken the liberty of going beyond the record and examining pertinent provisions of printed copies of the Charter and ordinances," and bases its decision and judgment affirming the trial court's judgment on a purportedly applicable ordinance not introduced in evidence, has such state deprived the parties against whom the judgment is adverse of property without due process of law or denied to such parties the equal protection of the laws, in violation of Section 1 of Article XIV of the amendments (the 14th Amendment) to the Constitution of the United States of America?

2. When the Supreme Court of a state, in an action involving the financial liability of a municipal corporation under a charter provision for the payment of benefits or pensions to members and former members of its police department, expressly overrules and retracts its decision with reference to the identical charter provision rendered more than seven years earlier and applies such reversal and overruling retrospectively so as to deprive and divest the municipality of its defenses and of rights accrued, vested, and in existence prior to such reversal, has such state deprived the municipality of property without due process of law or denied to it the equal protection of the laws, in violation of Section 1 of Article XIV of the amendments (the 14th amendment) to the constitution of the United States of America)?

CONSTITUTIONAL PROVISIONS, CHARTER PROVISIONS, AND ORDINANCES INVOLVED.

Constitutional provisions involved.

"CONSTITUTION OF THE UNITED STATES
"• • •

"*Amendments*
"• • •

"Article XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Sec. 1 of Article XIV of the amendments [the 14th amendment] to the constitution of the United States of America.)

Charter provisions involved.

Section 133 of the Charter of the City and County of Denver (1953 Compilation), headed or entitled "Police Pension and Relief Fund." The provisions of this section of the charter of Denver are lengthy; the text thereof is therefore set forth verbatim as Appendix C to this petition.

Ordinances involved.

Article IV of Chapter LVII of the 1927 Municipal Code of the City and County of Denver, comprising sections 1565 through 1583, both inclusive, of said code. The 1927 Municipal Code of the City and County of Denver (otherwise known as Ordinance No. 156, Series of 1927) was a complete codification and revision of the general ordinances of the City and County of Denver, and Article IV of Chapter LVII thereof, being sections 1565 through 1583, both inclusive, is the part thereof pertinent to this case, and is headed or entitled "Police Department Relief Fund." Because of its length the text of this chapter is set forth as Appendix D to this petition.

Section 011.12-1 (otherwise known and cited as subsection 1 of Section 12, Article 1, Chapter 1, Main Division 0) of the Revised Municipal Code of the City and County of Denver, which was enacted by and was originally properly designated as Ordinance No. 250, Series of 1950, and became effective March 15, 1951. This code generally is referred to simply as the "Revised Municipal Code" and was also a complete codification and revision of the general ordinances of the City and County of Denver. It has been many times amended and is the current code of general ordinances of Denver; it is appropriately referred to as "Ordinance No. 250, Series of 1950 as amended," as the "Revised Municipal Code of the City and County of Denver," or as—and generally—the "Revised Municipal Code," the latter term signifying Ordinance No. 250, Series of 1950 together with all amendments thereof to date. Chapter 1 of Main Division 0 of the Revised Municipal Code consists of general provisions, Article 1 of such chapter is entitled "Explanatory Material, Penalty, Repeal," Section 12 of such article (being also Section 011.12 of said Revised Municipal Code) is headed "Saving Clause and General Provisions Relating to Repeals and Amendments," and subsection 1 of said Section 12 (being also Section 011.12-1 of said Revised Municipal Code) is as follows:

> "*.12-1. Saving Clause.* The repeal of any section of Ordinance No. 156 of the Series of 1927 (meaning and referring to the 1927 Municipal Code), or any other ordinance or section thereof or rule or regulation lawfully promulgated thereunder by Section 011.13 of this *Revised Municipal Code* shall not affect, deny, abridge, or impair any right, action, or cause of action accruing or arising under the section or sections so repealed. Such right, action, or cause of action may be prosecuted to a final determination under the section or sections repealed by Section 011.13 hereof, notwithstanding such repeal. No fine or other penalty shall be abrogated by Section 011.13 hereof." (Parenthetical matter interpolated.) Revised Municipal Code Section 011.12-1.

Section 011.13 (otherwise known and cited as Section 13, Article 1, Chapter 1, Main Division 0) of the Revised Municipal Code is as follows:

> ".13. *Ordinances and Parts of Ordinances Repealed.* The following ordinances and parts of ordinances are hereby repealed: Ordinance No. 156 of the Series of 1927 (meaning and referring to the 1927 Municipal Code), except Sections 120 to 186 inclusive, 1473 to 1514 inclusive, and 1782 to 1796 inclusive:"
>
> | *Ordinance No.* | *Annual Series* |
> |---|---|
> | 123 | 1915 |
>
> (Then follow approximately six pages listing other ordinances which are repealed, none of which are pertinent to this case and are therefore omitted)" (parenthetical matters interpolated.) Revised Municipal Code Section 011.13.

STATEMENT OF THE CASE—PART I. FACTS MATERIAL TO QUESTIONS PRESENTED

This case originated in the District Court (a court of general jurisdiction) of the City and County of Denver and State of Colorado. It was a class action; the named plaintiffs and all those similarly situated were persons who had been appointed members of the Denver police department prior to June 1, 1947, and who, prior to such date, had while engaged in the line of their duties, suffered physical injuries resulting in total disability and had been retired by the Manager of Safety and Excise under a then existing ordinance of Denver. Included within the designation of persons similarly situated were the legal representatives of persons alive and situated similarly to the named plaintiffs on June 1, 1947 but who had died between June 1, 1947 and the date of the institution of the suit, which was April 4, 1955; the presence of such representatives introduced no additional legal problems in the case.

The litigation arose from the fact that when plaintiffs were retired from the Denver police department prior to June 1, 1947, they were so retired under an ordinance of Denver, known as Sections 1567 through 1583 of the 1927 Municipal Code of the City and County of Denver, which established and provided for the administration of a "Police Department Relief Fund," and their rights to retirement benefits were governed exclusively by that ordinance until June 1, 1947, when there became effective an amendment to the charter of Denver (adopted earlier in 1947 by vote of the people) which established a "Police Pension and Relief Fund." This charter amendment contained provisions as to pensions and benefits payable therefrom to members of the police department and also to previously retired members and to members who had theretofore been granted pensions. The ordinance under which plaintiffs were retired is set forth in Appendix D to this petition, and the 1947 charter amendment is set forth in Appendix C hereto. Defendants in the case in the District Court, petitioners here, were and are the Police Pension and Relief Board (created by the 1947 charter amendment to administer the Police Pension and Relief Fund which was also created thereby), the members of such Board, the Auditor of the City and County of Denver, and the City and County of Denver, a municipal corporation. The fundamental purpose of the suit was to determine the rights of plaintiffs under the 1947 charter amendment, which was adopted and became effective after they had been retired under the 1927 ordinance.

As will be apparent from the foregoing introductory remarks, the case originally presented a question of the construction of the charter of a Colorado municipality, a matter for the determination of the courts of Colorado, and did not *originally* embrace any federal question. The pleadings therefore contained detailed allegations and statements with which this court need not be concerned, and the balance of this statement of the case will be abbreviated to the extent consistent with an understandable presentation

of the facts and of the manner in which federal questions became involved and were raised.

The suit was instituted by the filing of plaintiffs' complaint on April 4, 1955 (Record, Pages 5-11), which was superseded by the filing of a stipulation and agreed statement of facts on October 30, 1956 (Record, Pages 12-34).

The agreed statement of facts sets forth that plaintiffs prior to June 1, 1947, had been appointed members of the police department of Denver and were such members prior to being retired therefrom (Par. 5; Record, Page 17); and that at the times they were so retired there was in effect an ordinance of the City and County of Denver (set forth in Appendix D to this petition) providing in parts as follows (the section numbers are those of the 1927 Municipal Code, only so much of said sections being quoted in the body of the petition as is necessary to an understanding of the case);

> "Section 1565. There • • • is hereby created a police department relief fund • • •." (Par. 6; Record, Page 17.)
>
> "• • •
>
> "Section 1574. If any such officer, member, or employe (of the police department), while engaged in the line of his duties, shall suffer physical injury resulting in total disability, • • • he shall be retired from service, and • • • shall be paid monthly from said fund an amount equal to one-half the average monthly salary now being paid or hereafter to be paid for the same class of service, which the retired member was performing during one year next before the time of such injury • • •." (Par. 6; Record, P. 18.)

The agreed statement further sets forth that prior to June 1, 1947, each plaintiff while engaged in the line of his duties suffered physical injury resulting in total disability which has continued, and was by the then Manager of

Safety and Excise (who was the official charged with the administration of the Police Department Relief Fund by the 1927 Municipal Code) retired from service pursuant to the terms of Section 1574 of the ordinance (supra), and that the time each plaintiff was so retired from service was prior to his having actively served for twenty-five years in said police department. (Par. 7; Record, Page 20.)

Continuing, the agreed statement further stipulates that subsequent to their respective retirements each plaintiff was paid monthly from said Police Department Relief Fund amounts equal to one-half the average monthly salary being paid at the time of each such payment for the same class of service which he was performing during one year next before the time he suffered such physical injury, and that such payments were so made until June 1, 1947. (Par. 8; Record, Page 20.)

The next event (Par. 9; Record, Page 20) stipulated is that on June 1, 1947 an amendment to the charter of the City and County of Denver (set forth in Appendix C to this petition) is in parts as follows (here, again, only so much of said amendment as is necessary to an understanding of the case is quoted in the body of the petition);

> "*133. Police pension and relief fund.* (Section 239) There is hereby created a 'Police Pension and Relief Board' consisting of five members, • • •. • • •.
>
> "The 'Police Pension and Relief Board' shall have exclusive control of all matters pertaining to the granting of relief to members of the Denver Police Department, • • • and to granting of pensions to the members of said department and their dependents at the termination of their active service • • •." (Par. 9; Record, Page 21.)
>
> • • •
>
> "RETIREMENT
>
> Any member of the Denver Police Department • • • who shall have completed twenty-five years of

active service in said department shall, upon his request, be retired from further service in said department and such member shall thereafter, during his lifetime, be paid in equal monthly installments from the 'Pension and Relief Fund' a pension equal to one-half (½) of the average monthly rate of salary which such member shall have received in such department during the one year preceding the date of the termination of the said member's twenty-five years of active service.

"The pension herein provided for shall be paid to those who have been retired from service prior to the effective date of this amendment, as well as those who shall be so retired after the effective date of this amendment; • • •.

"In the event that salaries in the Denver Police Department shall be raised after the effective date of this amendment those members of said department who shall have previously been retired from active service and who are receiving a pension shall be entitled to an increase in the amount of their pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired.

"No member of the Denver Police Department shall be retired from active service or be granted a pension prior to the termination of said member's twenty-five years of active service." (Par. 9; Record, Pages 22, 23.)

"• • •

"INJURY IN LINE OF DUTY

"• • •

"Any member of the Denver Police Department • • • who shall become so physically or mentally disabled by reason of bodily injuries received in the discharge of the duties of said member in said department that he is rendered unable to perform his

duties in said department, shall be granted any necessary leave or leaves of absence not to exceed one year • • •.

"Should such member need additional leave of absence in excess of one year he may use his accumulated sick leave at full pay • • • and should said member still need additional leave of absence he may be granted said additional leave of absence at one-half the salary for the rank he holds in said department to be paid from the 'Pension and Relief Fund'; • • •." (Par. 9; Record, Pages 25, 26.)

"• • •

"RELIEF FUND

"There is hereby created a 'Police Pension and Relief Fund' which shall be composed of money from the following sources: • • •." (Par. 9; Record, Pages 26 and 27.)

"• • •

"This amendment shall become effective June 1, 1947, and shall apply to all members of the Denver Police Department • • • as of said date, to all members entering such service after said date, and to all members of said department who have been granted pensions heretofore." (Par. 9; Record, Page 27.)

The agreed statement then recites that from June 1, 1947 (the effective date of the 1947 charter amendment) until November 30, 1949, defendant City and County of Denver paid plaintiffs in equal monthly installments from the Police Pension and Relief Fund pensions equal to one-half (½) of the average monthly salary being paid at the time of each such payment for the same class of service which each such plaintiff was performing during the one year next preceding the time of said plaintiff's injury and retirement; that each such payment so made during such period to each of said plaintiffs included amounts equal to one-half of raises in pay granted in the rank each of said

plaintiffs held at the time he was retired between the date of his retirement and June 1, 1947; and that all of the payments so made were made by the City and County of Denver and received by plaintiffs in good faith and in the belief that they were justly due under the terms of the 1947 charter amendment. (Par. 10; Record, Pages 27 and 28.)

The agreed statement then recites that on November 28, 1949, the Supreme Court of the State of Colorado entered its decision and judgment in a case wherein McNichols, Auditor (of the City and County of Denver), and others were plaintiffs in error and Police Protective Association and others were defendants in error, said cause being numbered 16,152 and the decision therein being reported in 121 Colo. 45 and 215 P. (2d) 303. (Par. 11, Record, Page 28.) (Note: as will be commented on later herein, this case expressly held that the pensions of those who had retired from the Denver Police Department before June 1, 1947 should be reduced to the amount at which they were originally retired where they had served less than twenty-five years of active service.)

Following the entry of such judgment and the rendering of such opinion by the Supreme Court of Colorado on November 28, 1949, the agreed statement continues, and commencing with the month of December, 1949, the City and County of Denver has paid to each plaintiff from the Police Pension and Relief Fund a pension equal to one-half of the average monthly salary paid for the class of service which such plaintiff was performing during the one year next before the time of his injury and retirement plus amounts equal to one-half of all raises in pay granted subsequent to June 1, 1947 and prior to April 1, 1956, in the rank he held at the time he was so retired, but refused and refuses to increase the amounts of such payments because or on account of any raises in pay which were granted between the time said member was retired and June 1, 1947, in the rank he held at the time he was so retired. (Par. 12; Record, Pages 28 and 29.)

On March 20, 1956, it is further agreed, the charter of the City and County was again amended, effective April 1, 1956; this amendment (which also gave increases in pay in the various ranks in the police department) provided in part;

> "(10) Members * * * of the Police Department who have retired prior to the effective date of this amendment shall not have added to their pension benefits or allotments one-half of any increases in pay granted by this amendment for the ranks which they held at the time of retirement, * * *.
>
> "Further, on and after April 1, 1956 Section 133 of the Charter of the City and County of Denver (1953 Compilation) shall be and the same is hereby amended by repeal and deletion of that portion of said Section which reads as follows:
>
> " 'In the event that salaries in the Denver Police Department shall be raised after the effective date of this amendment those members of said department who shall have previously been retired from active service and who are receiving a pension shall be entitled to an increase in the amount of their pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired.'
>
> provided that nothing herein shall be construed or considered as affecting the right of any retired member or any dependent of any deceased retired member to continue to receive the amount of pension benefit or allotments due or being paid to any persons as of March 31, 1956, without reduction thereof.
>
> "* * *" (Par. 13; Record, Pages 29 and 30.)

The agreed statement of fact was drawn with the view in mind of securing a declaratory judgment, and sets forth the contentions of the plaintiffs and defendants. (Pars. 14 and 15; Record, Pages 31 and 32.)

The contentions of each plaintiff were (1) that he is and ever since June 1, 1947 has been entitled to additional leaves of absence because of the injuries received by him, and (2) that he is and ever since June 1, 1947 has been entitled to be paid in equal monthly installments from the Police Pension and Relief Fund an amount equal to one-half of the average monthly salary for the class of service he was performing during the one year next before the time of his injury and retirement, plus one-half of all raises in pay granted in the rank which he held at the time he was so retired which were so granted subsequent to the time he was so retired. (Par. 14; Record, Page 31.)

The contentions of defendants were (1) that none of the plaintiffs is nor since June 1, 1947 has been entitled to any leave of absence because of the injuries received by him; (2) that each plaintiff is entitled to be paid in equal monthly installments from the Police Pension and Relief Fund an amount equal to one-half of the average monthly salary for the class of service which he was performing during one year next before the time of his injury and retirement, plus one-half of all raises in pay granted in the rank which he held at the time he was so retired which were so granted subsequent to June 1. 1947 and prior to April 1, 1956; and (3) that each plaintiff is liable to and owes the City and County of Denver the aggregate amounts by which the payments made to him as aforesaid from said Police Pension and Relief Fund subsequent to June 1, 1947 and prior to December 1, 1949, included one-half of the raises in pay granted in the rank he held at the time he was retired which were so granted prior to the time he was so retired and until and including June 1, 1947. (Par. 15; Record, Pages 31, 32.)

Following the stipulation as to the facts above set forth, the agreed statement of facts prayed that the court declare the rights, status and other legal relations of the parties under the charter of Denver and under the ordinance therein referred to, and particularly with reference to the following questions;

"1. Were plaintiffs on June 1, 1947 and are they now entitled to leaves of absence from the Denver Police Department because of injuries received by them?

"2. How should the amounts properly payable to plaintiffs from the Police Pension and Relief Fund be computed?

"3. Is each plaintiff legally liable to and does each plaintiff owe unto defendant City and County of Denver the aggregate amount by which payments made to him from the said Police Pension and Relief Fund subsequent to June 1, 1947 and prior to December 1, 1949 include one-half of the raises in pay granted in the rank he held at the time he was retired pursuant to the ordinance hereinbefore set forth which were so granted subsequent to the time he was so retired and until and including June 1, 1947?" (Record, Pages 32, 33.)

The case came on to be heard upon the agreed statement of facts on October 30, 1956, and, after argument was taken under advisement by the judge of the District Court. (Record, Page 36.)

On November 30, 1956 the trial judge rendered a written opinion (Record, Pages 39-47) which is printed as Appendix A to this petition. This opinion gives the view of the trial court to be that "the language of *McNichols v. Police Protective Ass'n of Denver*, 215 Pac. (2d) 303, 121 Colo. at pages 50 and 51, has no application to the facts of this case." Having thus, to his own satisfaction, distinguished the cited case from the present one, the trial court on January 4, 1957 entered its judgment, order and decree that "the named plaintiffs and all other persons similarly situated were on June 1, 1947, members of the Police Department who were then and thereafter entitled to leaves of absence from the Denver Police Department, and that each such person was, on June 1, 1947, and thereafter to the termination of such leave of absence by death or other-

wise, entitled to be paid from the Police Pension and Relief Fund one-half the salary for the rank which he holds in said Department, including one-half of all raises granted in pay in his rank, all pursuant to Section 133 of the Charter of the City and County of Denver." (Record, Pages 49-52, at page 51.)

Thereafter appropriate proceedings were had to cause the judgment of the trial court to be reviewed on writ of error by the Supreme Court of Colorado (Record, Pages 54-72) and on October 14, 1957 the Supreme Court rendered, announced and filed its opinion in the case (Record, Pages 76-86) which is printed as Appendix B to this petition. In such opinion the Supreme Court held that an incidental provision in the judgment of the District Court regarding the payment of moneys determined to be due the plaintiffs into the registry of the trial court was an undue burden on the court, modified the judgment of the trial court to the extent of eliminating such provision, and, as so modified, affirmed the judgment of the trial court. Contemporaneously with the rendering of its opinion, the Supreme Court of Colorado entered its formal judgment that "it is ordered and adjudged that the judgment of said District Court be modified in accordance with the views expressed in the opinion on file herein, and that as so modified, the judgment of the said District Court be, and it hereby is, affirmed." (Record, Page 87.)

On October 29, 1957, the plaintiffs in error, petitioners here, filed their petition for rehearing (Record, Pages 88-94), and the same was denied without opinion on November 12, 1957. (Record, Page 95.)

STATEMENT OF THE CASE—PART II.
RAISING OF FEDERAL QUESTIONS.

As will be apparent from the foregoing Part I of this statement of the case, no federal questions were inherent in this cause, and the pleading—the agreed statement—upon which the hearing in the trial court was had did not

specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

When the case reached the Supreme Court of Colorado, however, and that court rendered its decision, federal questions were injected into the case for the first time by the decision of that court.

As will be shown under the "Argument" section of this petition, it is the settled law of Colorado that for ordinances to be considered they must be pleaded and proved, yet in the instant case the Supreme Court of Colorado went outside the record and "Examined" what it chose to consider as "pertinent" provisions of ordinances which were not set forth in the agreed statement of facts, and nowhere appeared in the record. We quote from the opinion of the Colorado Supreme Court as follows:

> "Though the parties have by stipulation set forth numerous Charter provisions and sections of ordinances which they wish to have construed, we have found it difficult if not impossible to determine the intent of the voters of Denver in adopting the Charter provisions or the intent of the City Council in adopting certain sections of ordinances without having before us the whole Charter and ordinances; consequently, and because of the public interest in the matters presented, we have taken the liberty of going beyond the record and examining pertinent provisions of printed copies of the Charter and ordinances. Our action in so doing is not to be construed as precedent for waiving or sanctioning failure to plead and prove ordinances relied upon." (Record, Page 80.)

It is the contention of petitioners that for a court of review to consider evidence not in the record in a given case, while at the same time recognizing the rule to be to the contrary, is a denial of due process of law and a deprivation of the equal protection of the laws, and petitioners raised these questions at the earliest opportunity they had

so to do, that is to say, in their petition for rehearing. We quote from the petition for rehearing:

> "2. The Court overlooked the fact that by 'going beyond the record' and examining 'pertinent provisions of printed copies' of ordinances (Op. p. 4, par. 3) this Court failed to adhere to its own decisions that judicial notice will not be taken of municipal ordinances but that the same must be proved, and under appropriate circumstances pleaded, and the action of the Court in thus considering evidence not in the record and to which plaintiffs in error have had no opportunity to make objection, or rebut with other evidence, is erroneous, • • • deprives plaintiff in error City and County of Denver of property without due process of law in contravention of Section 1 of Article XIV of the amendments (the 14th amendment) to the Constitution of the United States of America • • •, and deprives plaintiff in error City and County of Denver of the equal protection of the laws in violation of Section 1 of Article XIV of the amendments (the 14th amendment) to the Constitution of the United States of America. (No references to record or briefs can be given because these matters or questions did not exist in the case until injected therein by the decision and opinion of the Court.)" (Record, Pages 90, 91.)

The second federal question in this case is founded upon the action of the Supreme Court of Colorado in overruling and retracting its decision with reference to the identical charter provision involved in this case rendered more than seven years earlier *and* in applying such reversal and overruling retrospectively so as to deprive Denver of its defenses and of rights accrued, vested, and in existence prior to such reversal. We quote from the opinion of the Supreme Court of Colorado:

> "• • • The principal contention of counsel for the City is that *McNichols v. Police*, supra, holds

contrary to the decision of the trial court and that all parties are bound by the holding in that case. • • •." (Record, Page 84.)

"• • •

"We hereby expressly overrule and retract this Court's answer to the 'third specification' in *McNichols v. Police,* supra, and for the very good reason that the Court's answer is predicated on the assumption that the record disclosed the material facts, whereas nowhere in the record or the briefs do we find any mention of this 'Savings Clause' which is the key to the correct answer to the question presented in the 'third specification.'" (Record, Page 86.)

It is the contention of petitioners that such action of the Supreme Court in so reversing and overruling its prior decision *and* in applying such reversal and overruling retrospectively in this case is a denial of due process of law and a deprivation of the equal protection of the laws, and petitioners raised these questions at their earliest opportunity, which was in their petition for rehearing. We quote from the petition for rehearing:

"6. The action of the Court in reversing the decision in the case of *McNichols v. Police,* and so applying such reversal retrospectively or retroactively as to divest the City and County of Denver of its defenses and rights accrued, vested, and in existence prior to such reversal, is contrary to the well established rule of *stare decisis,* and, in addition deprives plaintiff in error City and County of Denver of its property without due process of law, and deprives it of the equal protection of the laws, contrary to • • • Section 1 of Article XIV of the amendments (the 14th amendment) to the Constitution of the United States of America. • • •." (Record, Page 93.)

This court has held that a federal question raised for the first time on petition for rehearing in the highest court of a state is raised in time to allow review on certiorari by

this court, where such question is presented by a construction placed upon a statute by the state court in its decision at variance with a construction formerly adopted by it, since the federal claim was raised at the first opportunity. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107. This is the identical situation in the case at bar except for the immaterial fact that a charter rather than a statute is involved. In both the cited case and the case at bar the petition for rehearing was denied by the state court without opinion.

REASONS FOR ALLOWING THE WRIT

1. The Supreme Court of Colorado, by its judgment and decision, has deprived petitioner City and County of Denver of property without due process of law and has denied it the equal protection of the laws.

2. The facts that in 1949 the City and County of Denver was paying pensions to some sixty-five retired police officers at a particular rate, and ceased paying them at that rate when in November of that year the Supreme Court of Colorado held the rate improper and unlawful, and the fact that in 1957 the same court held that it had been wrong in 1949 and, because of its so-called error affirmed a judgment saddling the City with liability for pensions during the intervening years at the rate the City had originally paid, present special and important reasons for review of such judgment on writ of certiorari, in order that this court may determine whether a party who conforms to a judgment determining its liability can, years later, be compelled, with constitutional sanction, to pay the amounts which it had been paying prior to such judgment and which it ceased paying only because of such judgment, for the period when such earlier judgment was in full force and effect.

ARGUMENT

1. While a municipal corporation, insofar as it is simply an agency of the state for conducting the affairs of government and subject to the control of the legislature,

may not invoke the 14th amendment against a regulation prescribed by the legislature, it is entitled, insofar as its property is concerned, to the protection of the 14th amendment where its property rights are imperilled by the action of an agency of the state other than the legislature (*Village of Boonville v. Maltbie*, 281 N. Y. S. 787, 156 Misc. 6). Denver, moreover, is a "home-rule" city organized and existing, not by virtue of a legislative charter, but under and by virtue of Article XX of the Constitution of the State of Colorado, and

> "The right of home rule by cities has been established in a number of states by constitutional provision. A home-rule city is protected by the due process guaranty." (12 Am. Jur., Constitutional Law, Sec. 593, p. 289.)

2. It is the established law in Colorado that judicial notice is not taken of ordinances, but that the same must be pleaded and proved.

> "• • • The validity of the city ordinance for a violation of which the plaintiffs in error in this case stand charged was called in question at the trial, but the ordinance is not before us. It was not copied into the bill of exceptions, and the court cannot take judicial notice thereof. • • •." (Garland et al. v. City of Denver, 11 Colo. 534, 536, 19 Pac. 460.)

> "But an ordinance is not a public or general law; it is not taken judicial notice of in suits or actions, but must be pleaded and proven; • • •." City of Greeley v. Hamman, 12 Colo. 94, 96, 20 Pac. 1.)

> "The authorities agree that if the prosecution be begun in any other than a municipal court, the plaintiff must prove the ordinance in order to be entitled to a judgment, and that courts do not judicially notice ordinances of a municipal corporation, unless specially directed by the charter or by the statute. • • •." (McIntosh v. The City of Pueblo, 9 Colo. App. 460, 462, 48 Pac. 969.)

"An ordinance is not a public or general law. It is not taken judicial notice of in suits or actions, but must be pleaded and proven. * * *." Weiss-Chapman Drug Co. v. People, 39 Colo. 374, 378, 89 Pac. 778.)

"The ordinance upon which the foregoing instruction seems to have been based was not introduced in evidence. It has been held by this court that courts will not take judicial notice of municipal ordinances; that they must be pleaded and proven.

"* * *

"It * * * is error to give an instruction, * * *, unless * * * it * * * is predicated upon competent evidence * * *. * * *.

" The court committed prejudicial error in giving the instruction quoted, for which error the judgment will be reversed." (Fay v. The City of Fort Collins, 40 Colo. 262, 264, 90 Pac. 512.)

"* * * This court cannot take judicial notice of the provisions of ordinances of municipal corporations." (Coors v. Brock, 22 Colo. App. 470, 474, 125 Pac. 599.)

"Defendants attempted to justify their conduct under an ordinance, which they say plaintiff was duly convicted of violating. The district court could take no judicial notice of the town ordinances. Defendants were obliged to introduce the ordinance upon which they relied, in evidence. * * *" (*Wolfe v. Abbott et al.*, 54 Colo. 531, 533, 131 Pac. 386.)

"As section 26 was the only ordinance introduced in evidence, it is the only one we can consider. * * *." (*Gault v. City of Fort Collins*, 57 Colo. 324, 325, 142 Pac. 171.)

"Numerous other grounds are argued as sufficient to warrant reversal. We pass upon none of them for the reason that they are not properly before us

under the record in this case. They generally deal with ordinances of the City of Boulder and there was no proof or showing of any kind with reference to such ordinances. We cannot accept the recitation contained in the briefs of counsel concerning the nature of municipal ordinances as evidence of the existence thereof. *We cannot take judicial notice of such ordinances,* and, if material to a controversy, *they must be made a part of the record,* either by proof thereof or by stipulation of counsel." (*Rinn v. The City of Boulder,* 131 Colo. 243, 245, 280 P. (2d) 1111. Emphasis supplied.)

Even in the case at bar the Supreme Court of Colorado recognized the propriety and correctness of the rule enunciated in the nine cases last above cited (covering a period of almost seventy years) for it cautioned that its action in going outside the record was "not to be construed as precedent for waiving or sanctioning failure to plead and prove ordinances relied upon." (Record, Page 80.) The effect of the decision is to announce one rule for suits against defendants in general and a special rule (announced, moreover, after the event) for suits against Denver.

3. The 14th amendment, of course, applies to state courts as well as to legislatures. As this court stated in *Chicago, Burlington, & Quincy Railroad Company v. City of Chicago,* 166 U. S. 226, 41 L. Ed. 979.

"• • • But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional

prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' (Citing authorities) * * *."

Diligent research has not disclosed any case identical with the case at bar. Counsel for petitioners have been unable to find the report of any other case where an appellate court considered evidence not in the record, without affording the parties any chance to rebut the same or make any objection thereto or comment thereon, and then based its decision on such evidence. Some things, we submit, are evident upon statement, and we believe that this court will subscribe to the statement of the Court of Appeals for the Ninth Circuit in the case of *Chernekoff v. United States*, 219 F. 2d 721, at page 723, that

> "The fair hearing essential to meet the minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, relevancy and significance. Otherwise, such a hearing is in violation of the 'concept of ordered liberty.'"

The action of the Supreme Court of Colorado in the instant case no more comports with the concept of due process than if it had called in witnesses and discussed the facts with them in the absence of the parties or their counsel.

From the list of Colorado cases hereinbefore cited, and from the language of the Colorado Supreme Court in its opinion hereinbefore quoted, it is clear that because of what the Colorado court considered "the public interest in the matters presented" (Record, Page 80), it departed from the well recognized rule with reference to the necessity of ordinances being introduced in evidence and appearing in the record, and at the same time announced its action was not to be considered as "precedent." In other words, it followed a course of procedure which it had theretofore repeatedly said could not, and which it then said would not, be applied in other cases. This, we submit, is an announcement by the court itself that while other litigants had there-

tofore been protected against the possibility that a court might decide their rights on the basis of a supposedly applicable ordinance not in the record, and while litigants in future cases would be accorded the same protection, in the case at bar Denver would be deprived of that protection. Paraphrasing, one might say that the Colorado court ingenuously announced that the established law afforded litigants the protection of its theretofore uniformly observed rule, but that because of "public interest" the City and County of Denver was not entitled to the equal (or any) protection of such law! Equally as logically one on trial for murder might be deprived of all of his constitutional rights because of "public interest" in the trial.

Only once, as far as diligent search reveals, has a federal court been confronted with a situation where a state court has deliberately subjected a litigant to a course of procedure which would not and could not lawfully be applied to others under the same circumstances. In 1901 the Circuit Court for the District of Kentucky, in a habeas corpus proceeding, ordered the release of an attorney who pursuant to judgment of a state court was confined in jail for contempt, stating in its opinion that

> "Summarizing, we may say that the general principles which must control the court, and which seem established by the cases cited, and many others of a similar character, are these, namely: First, • • •; • • •; fifth, that the equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not and could not be lawfully applied to any other person in the state under similar circumstances; • • •." (*Ex parte Stricker*, 109 Fed. 145, 150.)

If a state court, while recognizing and expressly perpetuating a substantial procedural requirement, arrogates unto itself the right to ignore such requirement in a given case with respect to a given litigant, it should be admonished, in the words of this Court in *Shelley v. Kraemer*, 334 U. S.

1, (Page 22), 92 L. Ed. 1161, (Page 1185), that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

From the foregoing we submit that it is clear that by going outside the record in this case the Supreme Court of Colorado both deprived the City and County of Denver of its property without due process of law and denied to it the equal protection of the laws. That such action was disastrous to Denver is apparent from the fact that the reason the state court assigned for overruling and retracting its decision in *McNichols, Auditor, et al. v. Police Protective Association of Denver, et al.*, 121 Colo. 45, 215 P. (2d) 303, decided November 28, 1949, was, and we quote,

> "the very good reason that the Court's answer is predicated on the assumption that the record disclosed the material facts, whereas nowhere in the record or the briefs do we find any mention of this 'Savings Clause' which is the key to the correct answer to the question presented in the 'third specification.'" (Record, Page 86.)

The "Savings Clause" referred to is Section 011.12-1 of the Revised Municipal Code of the City and County of Denver, and is part of an ordinance "dug up" by the Supreme Court of Colorado and not in the record, and this ordinance was part of Ordinance No. 250, Series of 1950, which became effective March 15, 1951. In other words by departing from orderly rules and procedures, the state court has come up with the statement that its conclusion in November of 1949 was in error because the record and briefs in a case it then decided did not mention an ordinance which was not even enacted until the following year. We are thankful the record in this case is certified by the clerk of the state court, as we would hesitate to ask this Court to give credence to such a state of facts on the statement of counsel alone. We emphasize this situation, not because this Court can or should determine the construction to be given to Denver's charter, but to demonstrate—we submit beyond a question of a doubt—that Denver has been de-

prived of property by the denial of due process of law and has been denied the equal protection of the laws.

4. Petitioners contend, finally, that the Supreme Court of Colorado by making its overruling and "retraction" of its prior decision in the case of *McNichols, Auditor, et al. v. Police Protective Association of Denver, et al., supra,* retroactive, so as to deprive Denver of its rights which had vested under the former adjudication, deprived Denver of its property without due process of law and denied it the equal protection of the laws. Fully realized is the statement that "state courts, like this court (the Supreme Court of the United States) may *ordinarily* overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of earlier decisions" (*Brinkerhoff - Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107. Emphasis supplied), but the case at bar is not an *ordinary* case. We submit, as stated in 21 C. J. S. Courts Sec. 194, page 329,

> "*b. Exception to General Rule* (that the overruling of a decision generally is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision.) An overruling decision cannot operate retrospectively so as to impair the obligation of contracts entered into, or injuriously affect vested rights acquired, in reliance on the overruled decision."

When Denver, which as before noted had been paying pensions or benefits to those policemen who had been retired prior to June 1, 1947 with less than twenty-five years of active service on the supposition that they were entitled to pensions or benefits computed in part on raises in pay in their respective ranks granted subsequent to their respective retirement dates, ceased such payments in 1949 pursuant to the ruling in *McNichols, Auditor, et al. v. Police Protective Association of Denver, et al, supra,* it was acting pursuant to the decision and judgment of the highest court of Colorado. Had Denver or any of its officers attempted to

continue such payments at the prior rates the City could have been enjoined from so doing, and any officer who might have successfully accomplished any such payment could have been held personally liable for the same at the suit of the city or of any taxpayer thereof. When, therefore, in compliance with the decision of the highest court of the state the city and its officers made payments at the rate and on the basis ordered by that court, and such payments were accepted by the retired officers, it seems obvious that such payments were made and accepted in full satisfaction of the city's liability while such decision was in full force and effect. The suit that resulted in the decision in the *McNichols* case, *supra,* was brought by the Auditor of Denver (see Supreme Court's statement, 121 Colo. at page 48) to determine the city's liability and his duty with respect to the payments which should be made under the 1947 charter amendment, and the solemn decision of the Supreme Court of Colorado was rendered in due course. Is that decision to have no effect whatsoever? and if so, why should any of the parties pay any attention to any decision of any court? If payments made by a city pursuant to an express declaration as to liability by the highest court of the state do not give a defense to a claim of greater liability until such decision is overruled or reversed, then indeed the whole judicial process is sham. While of course petitioners feel that the Supreme Court of Colorado erred in overruling its earlier decision, they by reason of such overruling alone are no different than other disappointed litigants and cannot ask this court for relief solely because they think their local court should have abided by such earlier decision; what petitioners do urge is that under the circumstances of this case when the City made the payments ordered to be made by the *McNichols* case in 1949 they paid what was required to be paid by them and were, by such payments, vested with a legal defense to the claim of any greater liability. It is Hornbook law that a defense is entitled to constitutional protection as much as a cause of action, and petitioners cannot be deprived thereof, retrospectively, by a later decision. If the judgment here sought be reviewed on certiorari

is ultimately reversed, and of course petitioners think it should be, the Supreme Court of Colorado may or may not adhere to its ruling that the *McNichols* decision was erroneous; if it does adhere to that ruling the City and its officials must and of course will recognize that the increased financial burden from the date of the overruling of the *McNichols* case is simply one of those things that is bound to happen from time to time unless courts are forbidden to change rulings which they believe to have been erroneous. Petitioners do not ask that the Colorado court be prohibited from overruling the *McNichols* decision, what they do ask is that they, having complied with that decision, be protected from being held to a greater liability than that pronounced therein during the period when such decision was in effect. To deprive Denver of its defense under the *McNichols* case is to deprive it of its property without due process of law and to deny it the equal protection of the laws—that protection accorded others by compliance with judicial pronouncements as to their liabilities.

A contract is no more sacred, from a constitutional standpoint, than a vested right of defense. Considering a contract this court has said:

> "• • • The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it perspective, but not retroactive. *After a statute has been settled by judicial construction, the construction becomes,* so far as contract rights acquired under it are concerned, *as much a part of the statute as the text itself,* and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.
>
> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was

judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a State court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts, in respect to their past adjudications, are well expressed in *Boyd v. Alabama* (94 U. S. 645), where we spoke through Mr. Justice Field. If the Township Aid Act had not been repealed by the new Constitution of 1875 (art. 9, sec. 6), which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. We regret to find ourselves in conflict with the courts of the State in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction." (*Douglass v. County of Pike*, 101 U. S. 677, 687.)

The United States District Court in California has used this language;

"When courts of last resort, *especially in interpreting statutes*, have announced certain definite principles relating to the acquisition of real property and the principles have been long established, frequently recognized and conformed to, and property rights have been acquired thereunder, it has generally been held that such decisions should not be

> overturned, although the principles therein announced might otherwise be questioned.' See American Mortgage Co. v. Hopper (C. C. A. 9, 1894) 64 F. 553, 554; and see Douglas v. County of Pike (1879) 101 U. S. 677, 687, 25 L. Ed. 968.
>
> "They become then a rule of property. The courts which have promulgated them may change them, but such change can work prospectively but not retrospectively." (*U. S. v. Standard Oil Co. of Calif.*, 20 F. Supp. 427, 455.)

A vested right of defense is as much the subject of legal protection as a right in real property.

In 1929, in the case of *Brinkerhoff - Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1107, at 281 U. S. pages 681 and 682, this court said,

> "• • • But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

It cannot be asserted that a vested defense is not a right, it cannot be asserted that during all the years from 1949 until 1957 Denver could not have had the benefit of all the remedies of the law in the protection and enforcement of that right. Yet the decision of the Colorado Supreme Court which petitioners are seeking to have reviewed, if allowed to stand deprives the city of that right of defense, a right which the state had no power to destroy, without affording it any opportunity whatsoever to protect it. This we submit, is a deprivation of property without due process of law, and, because other parties who comply with court decisions in legally similar situations are uniformly held

to be entitled to the benefit of such decisions during the periods when they are in full force and effect, is a denial to petitioners, and particularly to the City and County of Denver, of the equal protection of the laws.

CONCLUSION

Petitioners submit that the action of the Supreme Court of Colorado in going outside the record in a search for evidence in this case, and in considering and basing its decision on evidence not in the record and which petitioners did not and could not know would be considered and as to which they were afforded no opportunity to be heard concerning its relevancy or significance, deprived the City and County of Denver of property without due process of law, and, because such action of the court was contrary to the rule applied—and, according to the court itself, to be applied—to other litigants in similar circumstances, also was a denial of the equal protection of the laws.

Petitioners further submit that in view of the following language in the decision rendered by the Supreme Court of Colorado in the case of *McNichols, Auditor, v. Police Protective Association of Denver, supra,*

> "The third specification is: 'The trial court erred in failing to hold that the pensions of those who had retired from the Denver Police Department before June 1, 1947 should be reduced to the amount at which they were originally retired where they had served less than twenty-five years of active service.' We are of the opinion that the ruling of the trial, to which reference is made in this specification, did constitute reversible error. * * * There is no provision in the act recognizing the raises in pay in the rank any member (retired prior to twenty-five years service) held between the time he was retired and the effective date of the amendment, June 1, 1947. We believe, therefore, that on this point the auditor is correct and that the trial court's judgment on this provision

should be reversed in accordance with this paragraph." (121 Colo. 50, 51, 215 P. (2d) 306.)

all that the city could possibly do was to reduce the pensions of those who had so retired with less than twenty-five years of active service to the amounts at which they were originally retired; that the payment of such amounts was the extent of the city's liability thereafter as long as the *McNichols* decision was in force and by the payment thereof the city acquired complete and fully vested defense to any claim for liability in any greater amount; and that the judgment herein sought to be reviewed on certiorari, by requiring payments for the period when the *McNichols* decision was in full force and effect in amounts in excess of those therein determined to be due, deprives the City and County of Denver of property without due process of law and denies to it the equal protection of the laws.

This case is a substantial one. It involves payments to approximately sixty-five men (Record, Pages 9, 10), or the representatives of such as are now deceased, over a period of eight years. It involves federal constitutional questions of the utmost importance. Accordingly it is respectfully submitted that this petition for a writ of certiorari should be granted.

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January 1958.

APPENDIX A

(Opinion of the trial Court)

IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER
AND STATE OF COLORADO

Civil Action No. B-2062

CHARLES E. BEHNKE, ARTIE D. DAVIS, RAYMOND W. FELL, and FRANK G. KNAUS, on behalf of themselves and all other persons similarly situated,
Plaintiffs,

vs.

POLICE PENSION AND RELIEF BOARD and EDWARD O. GEER (substituted for Charles J. Lowen), JAMES T. O'DONNELL, DUANE BORDEN, TIMOTHY CROW (substituted for Harry Brofman, Harold A Dill and Morris A. Pade) and IVAN ELDHER, as Members Thereof; THOMAS G. CURRIGAN (substituted for William H. McNichols) as Auditor of the City and County of Denver; and the CITY AND COUNTY OF DENVER, a municipal corporation,
Defendants.

MEMORANDUM OPINION

FRANTZ, Judge.

The "Stipulation and Agreed Statement of Facts" shall constitute the findings of fact of the decree hereafter to be drawn. Paragraphs 14 and 15 of the "Stipulation and Agreed Statement of Facts" set forth the opposing contentions of the parties. In the prayer or demand three questions relating to the rights, status and other relations of the parties are presented for determination.

This is a class action brought against the Police Pension and Relief Board, the individual members thereof, the Auditor of the City and County of Denver, and the City

and County of Denver. The class embraces the named plaintiffs and all other persons similarly situated, and all persons who were similarly situated on June 1, 1947, and who are now deceased. In respect to such deceased members it is sought to have declared their rights, status and other legal relations in manner binding on their heirs, executors and administrators

Each of the plaintiffs had prior to June 1, 1947, and prior to having actively served for twenty-five years in the police department, suffered physical injury while engaged in the line of his duties resulting in total, continuing disability requiring his retirement from service pursuant to Section 1574, Ch. 58, Art. 4, 1927 Municipal Code of the City and County of Denver. What effect did the 1947 and 1956 Amendments to the Charter have upon these plaintiffs? That is the question.

By charter and ordinance certain pension and relief measures have been established in regard to officers, members or employees of the police department of Denver who have become aged, infirm or disabled, or who have become eligible for retirement because of the completion of certain years of service, and providing for benefits under certain conditions to designated dependents in the event of their death. As indicated, there have been several changes since the beginning of this aid plan in 1904.

Certain pertinent portions of the charter, the Municipal Code of 1927, and the 1947 and 1956 Charter Amendments are quoted in the "Stipulation and Agreed Statement of Facts." The answer to the problem presently before the Court involves the proper interpretation of these several legislative acts.

It may be as aptly said now as it was said in *McNichols v. Walton*, 208 Pac. (2) 1156, 120 Colo. 269, 270, involving the interpretation of the 1947 Charter amendment, that

> "This case brings up * * * many and difficult questions of interpretation growing out of the *unfortunately* worded policemen's pension amendment

to the Denver Charter, which plague the city officials and demand much time and labor by the courts."

Our Supreme Court "has adopted a liberal attitude toward pension statutes and amendments thereto," *McNichols v. Denver*, 280 Pac. (2) 1096, 131 Colo. 246, 252. Police pension provisions "must receive liberal interpretation, and ambiguities and uncertainties must be resolved in favor of those to be benefited thereunder." *State ex rel. Schoedinger, et al., v. Lentz*, 132 Oh. St., 5 N.E. (2) 167, 170. Without mentioning these rules of interpretation, but in the resultant decision as surely employing them as if they were quoted in extenso, our Supreme Court in *People ex rel. Albright v. Board of Trustees*, 82 Pac. (2) 765, 103 Colo. 1, fixed the course which gave direction to later cases, and from which this Court should not deviate.

Yet, at best, these rules of statutory construction are recognized as mere guides which a court would unwisely apply abstractly or accept as absolutes in every case. At most, this Court is committed to the proposition that where language may be construed so as to effectuate a benign policy, so long as it is within the intent of the legislation considered, it should be done. And what is the intent of the legislation presently considered?

If there is any doubt as to the intent of the "unfortunately worded" amendments, insofar as the problem here is to be resolved—a matter this Court disputes—, the Court need only heed the admonition of our Supreme Court in *Kirschwing v. O'Donnell*, 207 Pac. (2) 819, 120 Colo. 125, 128:

> "• • • In our attempt to spell out the intended meaning of the people in the enactment of this provision, we may well be guided by the rule stated by the California court: 'If the meaning of the language as it was intended to be understood • • • be uncertain or doubtful, then the question of legislative intent is presented and that intention must be ascertained by a consideration of the *language in connection with*

> *the context* of the statute in which the language is employed in its entirety, the *object* which said statute was designed to attain, and the *obvious consequences* which would follow a construction either way.' Klench v. Board of Pension Fund Com'rs., 79 Cal. App. 171, 249 Pac. 46."

Section 1574 (1927 Municipal Code) provides that one who, while engaged in the line of his duties, suffers physical injury resulting in total disability, rendering him unable to perform his duties, "shall be retired from service, and instead of his salary from said department he shall be paid monthly from said fund an amount equal to one-half the average monthly salary, now being paid or *hereafter to be paid* for the same class of service, which the retired member was performing during one year next before the time of such injury, *so long as the existence of such disability may from time to time be attested to in writing by two regularly certified practicing physicians . . .*'

Two things in the quoted section have an important bearing on our problem. First, it is to be noted that the beneficiary is only provisionally retired; he is subject to restoration to his rank for service upon the cessation of his disability. Secondly, this section requires the payment to him of "an amount equal to one-half the average monthly salary, now being paid or hereafter to be paid for the same class of service, which the retired member was performing during one year next before the time of such injury . . ."

Next to be considered as shedding light on our problem is that part of Section 133 of the 1947 Amendment which reads as follows:

> "The 'Police Pension and Relief Board' shall have exclusive control of all matters pertaining to the *granting of relief* to members of the Denver Police Department, in the classified service, *who shall become* sick or *injured* during their term of active service, and to the *granting of pensions* to the members of said department and their dependents at the

termination of their active service with said department."

Any construction which would disregard the obviously designed choice of words in the passage just quoted would amount to semantic emasculation. Recognition must be given to the fact that "relief" is granted to injured members, and a "pension" to those who terminate their active service.

Hence, the use of the term "pension" in the retirement provision relates only to those who have the necessary number of years to permit termination of active service. This notion is strengthened by the following language contained in the retirement section of the 1947 Charter Amendment:

> "No member of the Denver Police Department shall be retired from active service or be granted a pension prior to the termination of said member's twenty-five years of active service."

Moreover, the foregoing quoted portion of the Amendment casts light on the status of one who received a disabling injury while in the line of duty but has not served the requisite time for termination of active service. It makes certain that such member is deemed provisionally retired. This being true, it is the conviction of the Court that the language of *McNichols v. Police Protective Ass'n. of Denver*, 215 Pac. (2) 303, 121 Colo. 45, at pages 50 and 51, has no application to the facts of this case. Clearly, what was there said refers to "pensions" of persons who had under previous law, or who under the 1947 amendment had obtained, a pensionable status; what was there said pertained to persons retired from active service.

The provisions of the 1947 amendment concerning injury in line of duty are consistent with the construction so far placed upon the pension and relief law being considered. In part, these provisions read as follows:

> "Any member * * * who shall become so physically or mentally disabled by reason of bodily injuries

received in the discharge of the duties of said member in said department that he is rendered unable to perform his duties in said department, shall be granted any necessary leave or leaves of absence not to exceed one year at his full salary for the rank which he holds in said department, and shall be compensated from the regular Police Department payroll.

"Should such member need additional leave of absence in excess of one year he may use his accumulated sick leave at full pay on the regular Police Department payroll and should said member still need additional leave of absence he may be granted said additional leave of absence at one-half of the salary for the rank he holds in said department *to be paid from the 'Pension and Relief Fund'*: provided, however, that should such member be *eligible for retirement on a pension*, as herein provided, *he shall not be entitled to receive such additional disability*, but instead *shall be retired from active service* at the expiration of one year's leave of absence and his accumulated sick leave."

The only way that such member may be retired thereunder on a pension is upon showing of eligibility, i.e., that he has served the requisite time for a pension. If he has served the requisite time, he shall be retired from active service. Again, we have language indicating that plaintiffs were not, and could not be, retired from active service so as to be entitled to a pension; they were merely provisionally retired, by reason of which they are granted "relief."

Not being eligible for retirement, they are entitled to an additional leave of absence for one year at one-half of the salary for their rank from the Pension and Relief Fund, only to be paid after two previous leaves have been paid from the regular Police Department payroll. Since "sick leave is a matter personal to the member," payment thereof cannot be made to the heirs, executors and administrators of deceased policemen. *McNichols v. Police Protective Ass'n of Denver*, 215 Pac. (2) 303, 121 Colo. 45, 67, 68.

Nothing in the 1956 Charter Amendment appears to effect "relief" granted to those who were disabled while in the performance of their duties as policemen. This latest amendment clearly refers to "pensions" and those retired after serving the specified time necessary to render them eligible for a pension.

Under these circumstances the Court is convinced that the plaintiffs are not affected by the 1956 Amendment, that the plaintiffs "shall be paid monthly from said fund an amount equal to one-half the average monthly salary, now paid or hereafter to be paid for the same class of service, which the retired member was performing during one year next before the time of such injury," so long as his disability continues.

Thus, the context of the law permits but one construction. Considering the peril to their lives and limbs, the call on great courage in the face of danger, the risk of even losing life, all part and parcel of a policeman's life (*Klench v. Board of Pension Fund Com'rs.*, 79 Cal. App. 171, 249 Pac. 46), the people of Denver in their wisdom apparently desired that a physically disabled policeman, injured in the line of duty, be thus adequately taken care of during disability. Such construction, therefore, comports with context, the objects and the consequences, made the tests in *Kirschwing v. O'Donnell*, 207 Pac. (2) 819, 120 Colo. 125, 128, if the law could be said to be uncertain on the questions to be resolved.

Prevailing counsel should prepare a form of decree consonant with the views herein expressed, providing therein for the dispensation with motions for new trial or rehearing, and for proper orders to permit this matter to be reviewed by the Supreme Court.

Done in open court at the City and County of Denver, State of Colorado, this 30th day of November, A. D. 1956.

BY THE COURT:

ALBERT T. FRANTZ,

Judge.

APPENDIX B

(Opinion of Supreme Court of Colorado)

NO. 18267

POLICE PENSION AND RELIEF BOARD and EDWARD O. GEER (substituted for Charles J. Lowen), JAMES T. O'DONNELL, DUANE BORDEN, TIMOTHY CROW (substituted for Harry Brofman, Harold A. Dill, and Morris A. Pade), and IVAN ELDHER, AS MEMBERS THEREOF; THOMAS G. CURRIGAN (substituted for William H. McNichols) AS AUDITOR of the City and County of Denver; and the CITY AND COUNTY OF DENVER, a municipal corporation,

Plaintiffs in Error,

v.

CHARLES BEHNKE, ARTIE D. DAVIS, RAYMOND W. FELL, and FRANK G. KNAUS, on behalf of themselves AND ALL OTHER PERSONS SIMILARLY SITUATED,

Defendants in Error.

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO, OCT. 14, 1957.

GEORGE A. TROUT, Clerk.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER
Honorable Albert T. Frantz, Judge

EN BANC — JUDGMENT MODIFIED AND AFFIRMED

Mr. John C. Banks,
Mr. Horace N. Hawkins, Jr.,
Attorneys for Plaintiffs in Error.

Mr. E. F. Conly,
Attorney for Defendants in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

On April 4, 1956 four members of the Denver Police Department, for themselves and for all other persons similarly situated, filed their complaint against the Denver Police Pension and Relief Board, the five members thereof, and William H. McNichols, auditor of Denver, seeking a declaratory judgment determining the status and legal rights of the plaintiffs, injured and totally disabled members of the Denver Police Department.

On October 30, 1956 there was filed in the case a "stipulation and agreed statement of facts." This stipulation provided that the City and County of Denver should be added as a party defendant, that the then auditor and the then members of the Police Pension and Relief Board be substituted for those named in the complaint and no longer serving. The stipulation provided that the action is a class action and that any judgment entered should be binding on all members of the Denver Police Force who had been injured in line of their duties prior to June 1, 1947, and should also be binding upon their heirs, executors, etc. The stipulation set forth various provisions of the Denver Charter and Ordinances of the City of Denver in effect prior to June 1, 1947, touching on the rights of plaintiffs.

The parties further stipulated that each of the plaintiffs had been totally disabled prior to June 1, 1947, and from the date of disability until November 30, 1949 each had been paid by the City from the Police Pension and Relief Fund pensions equal to one-half of his average monthly salary during the one year next preceding his injuries *plus one-half of all raises in pay granted for the rank held at the time of his injuries and retirement*, and that said payments were made and accepted in the good faith belief that they were justly due under the Charter provisions and ordinances in force prior to June 1, 1947 and likewise under the provisions of the new Charter which became effective June 1, 1947.

It is further stipulated that this Court on November 28, 1949 rendered its decision in the case of *McNichols*,

Auditor, et al. v. Police Protective Association of Denver, et al., 121 Colo. 45, 215 P. (2d) 303, and that from and after that decision the City has paid to plaintiffs amounts equal to one-half of their salaries at the time of their injuries plus one-half of all pay raises after June 1, 1947, but has refused to include or pay such raises granted subsequent to the injuries and prior to June 1, 1947.

The parties also stipulated that on March 20, 1956 the City Charter was in certain respects again amended effective April 1, 1956.

The parties prayed that the District Court:

> ". . . declare the rights, status and other legal relations of plaintiffs and defendants under the charter of the City and County of Denver and under the ordinance hereinbefore set forth, and particularly with reference to the following questions:
>
> "1. Were plaintiffs on June 1, 1947 and are they now entitled to leaves of absence from the Denver Police Department because of the injuries received by them?
>
> "2. How should the amounts properly payable to plaintiffs from the Police Pension and Relief Fund be computed?
>
> "3. Is each plaintiff legally liable to and does each plaintiff owe unto defendant city * * * the aggregate amount by which payments made to him from said Police Pension and Relief Fund subsequent to June 1, 1947 and prior to December 1, 1949 include one-half of the raises in pay granted in the rank he held at the time he was retired pursuant to the ordinance hereinbefore set forth which were so granted subsequent to the time he was so retired and until and including June 1, 1947?"

The trial court answered the first question in the affirmative, the third question in the negative, and in response to the second question directed the auditor to compute and

approve payments due each plaintiff, such payments to include one-half of all pay raises prior to, as well as after, June 1, 1947, *and to pay said amounts into the registry of the Court.* To review this judgment and decree the case is presented here on writ of error.

Though the parties have by stipulation set forth numerous Charter provisions and sections of ordinances which they wish to have construed, we have found it difficult if not impossible to determine the intent of the voters of Denver in adopting the Charter provisions or the intent of the City Council in adopting certain sections of the ordinances without having before us the whole Charter and ordinances; consequently, and because of the public interest in the matters presented, we have taken the liberty of going beyond the record and examining pertinent provisions of printed copies of the Charter and ordinances. Our action in so doing is by no means to be construed as precedent for waiving or sanctioning failure to plead and prove ordinances relied upon.

Each of the plaintiffs at the time of his becoming totally disabled due to injuries received in line of duty was a member of the classified service as defined in Article XV of the Municipal Code 1927 of the City and County of Denver. In order to become such member each had to meet certain requirements, pass certain examinations, serve six months by original appointment, and at the termination of said six months, his service having been satisfactory, he was permanently appointed. Having met these requirements, the plaintiffs acquired valuable rights, such as job security, seniority rights, disability and sick benefits, pension rights, etc. These classified service rights could be lost (1) by proof of misconduct, etc., but only after proper hearing; (2) they could be given up by formal resignation or actions indicating clearly an intention to resign and inconsistent with continued membership; or (3) of course by death. Clearly each of the plaintiffs being a member of the classified service at the time of his injuries and thereafter receiving benefits, not having formally resigned or taken

any action indicating an intention to resign, remains a member of the classified service and a member of the Police Department of the City and County of Denver.

At the time each plaintiff was injured (prior to June 1, 1947) Article VI of the 1927 Municipal Code was in effect and provided for a "Police Department Relief Fund" to be administered by the Manager of Safety for the benefit of the aged, infirm, and disabled members of the department. The Charter as amended May 15, 1906 not only authorized *but directed* the City Council to provide for the fund and its administration. Pursuant to the Charter the City Council adopted an ordinance, being Article IV (Secs. 1565-1583) Municipal Code 1927, which ordinance among other things provides for a "Police Department Relief Fund" made up of various items (Sec. 1571) including:

> "(8) a monthly assessment of one percent upon the monthly salary of such [each] officer, member or employee, to be deducted and withheld therefrom."

Sec. 1574 provides that:

> "If any such officer, member or employee • • • suffer physical injury resulting in total disability • • • [is] thereby rendered unable to perform his duties • • • or otherwise support himself and family, he shall be *retired from service* and instead of salary from said department he shall be paid monthly from said fund an amount equal to one-half the average monthly salary now being paid *or hereafter to be paid* for the same class of service which the retired member was performing during one year next before the time of such injury, so long as • • • such disability • • • be attested to • • • by two • • • physicians • • •." (Emphasis supplied.)

Sec. 1578 provides that:

> "The manager • • • may in his discretion assign any *officer, member or employee* receiving benefits • • • to the performance of such duties *in the depart-*

> *ment* as they might be capable of discharging * * * the person so assigned shall receive as monthly *benefits* only the difference, if any, between the monthly compensation attached to the position to which he may be assigned, and one-half his average monthly salary during one year next before the time of his *disability* or *infirmity.*" (Emphasis supplied.)

From the above it is clear that prior to June 1, 1947 each plaintiff *on becoming totally disabled* was entitled to receive from the Police Department Relief Fund a monthly payment equal to one-half of the average monthly salary then being paid or thereafter paid for the class of service he performed during the year prior to his injury. The City so interpreted the Charter and ordinances and made payments, including all increases, in accordance with the above interpretation until the decision in *McNichols v. Police,* supra.

On May 20, 1947 there was submitted to the voters of Denver at the General Municipal Election "Proposition No. 4 on the ballot," which proposition provided:

> "That Section 239 (Section 133) of the charter of the City and County of Denver be and the same hereby is *amended* to read as follows:" (Here follows rather full and complete provisions for benefits and pensions for sick, disabled and aged members of the classified service employees and former employees of the Department.)

Then appears the following:

> "This amendment shall become effective June 1, 1947, and shall apply to all members of the Denver Police Department in the classified service as of said date, to all members entering such service after said date, and to all members of said department who have been granted pensions heretofore.
>
> "All provisions of the charter or any amendment thereto in conflict herewith or any part hereof shall be and the same are hereby repealed.

"Be it Further Enacted by the People of the City and County of Denver that Section 240 (Section 134) be and the same hereby is repealed."

The first of these three paragraphs clearly states that the terms of said proposition shall apply (a) to *all members of the Denver Police Department in the classified service* as of said date (June 1, 1947)—this includes the plaintiffs—, (b) to all members entering such service after said date, and (c) to all members of said department who have been granted pensions heretofore — this includes those granted pensions because of their age pursuant to Sec. 1577, 1927 Municipal Code, and who are no longer members of the classified service or employees of the Police Department.

The next paragraph provides for the repeal of all Charter provisions *in conflict* with Proposition No. 4, and the third paragraph expressly provides for the repeal of Section 240 (Section 134). This Section 240 designates the source of monies that went into the Relief Fund as provided in the 1904 Charter as amended in 1906. Significantly, this is the only Charter provision that is *expressly* repealed.

Having determined the rights of the plaintiffs as of June 1, 1947, we shall now seek to determine how those rights were affected by the adoption and putting into effect on June 1, 1947 of Proposition No. 4.

Clearly this Charter amendment of June 1, 1947 applies to plaintiffs; it could grant new or additional rights to plaintiffs and could have taken away non-vested rights previously granted and enjoyed. We find nothing in this amendment that purports to deprive plaintiffs of any rights previously granted. In fact we find, going beyond the ordinance pled, what we consider a most vital ordinance provision which constitutes a complete answer to the questions answered by the trial court and now here for review. The principal contention of counsel for the City is that *McNichols v. Police*, supra, holds contrary to the decision of the trial court and that all parties are bound by the hold-

ing in that case. We have carefully examined the record in *McNichols v. Police,* supra, and find that counsel therein presented only a portion of the ordinances touching on the questions involved, and failed to present ordinance provisions which provide a complete answer to the "third specification"—page 50 of the published opinion in the case of *McNichols v. Police,* supra, an answer opposite in effect to that given in the above case. Counsel for the City here contend, just as they contended in *McNichols v. Police,* supra, that the Charter adopted June 1, 1947 is a completely new law and that it had the effect of repealing all that had gone before in the way of Charter provisions and ordinances. We hold to the contrary. The Charter of June 1, 1947 purports only *to amend* the existing Charter; it purports to repeal *conflicting provisions* of the existing Charter and *expressly* repeals only one section—Section 240—of the previous Charter. Such language does not indicate an intention to undo all that had gone before. In addition, the City Council, *after June 1, 1947,* adopted Ordinance No. 250 and by Section 010-011-.13 thereof (explanatory material, penalty, repeal) expressly repealed all of Sections 1565-1583 of Ordinance No. 156. These repealed sections are the very ones under which plaintiffs acquired their rights prior to June 1, 1947. In repealing these sections the City Council necessarily took the position that they had not been repealed by adoption of the 1947 Charter. In connection with the repeal of these provisions the City Council made definite provision that all rights previously acquired thereunder be preserved.

Ordinance 250-010-011-.12-1 provides:

"*Saving Clause.*

"The repeal of any section of ordinance no. 156 of the series of 1927, or any other ordinance or section thereof or rule or regulation lawfully promulgated thereunder by Section 011-.13 of this revised Municipal Code shall not *affect, deny,* abridge or impair any *right,* action, or cause of action accruing

> or arising under the section or sections so repealed. Such right, action or cause of action may be prosecuted to a final determination under the section or sections repealed by Section 011-.13 hereof, notwithstanding such repeal • • •."

Thus it appears that the City intended to and did preserve and save for all persons all rights acquired under Ordinance No. 156 and this includes all rights acquired by the plaintiffs prior to June 1, 1947. In so holding we run head-on into this Court's answer to the "third specification" in *McNichols v. Police*, supra, and which answer was given on an incomplete statement of facts, a statement which unfortunately omitted the above quoted saving clause, which in itself contains the answer to the question asked.

We hereby expressly overrule and retract this Court's answer to the "third specification" in *McNichols v. Police*, supra, and for the very good reason that the Court's answer is predicated on the assumption that the record disclosed the material facts, whereas nowhere in the record or the briefs do we find any mention of this "Saving Clause" which is the key to the correct answer to the question presented in the "third specification."

The judgment of the trial court provides that payments determined to be due plaintiffs be paid to the Registry of the trial court. We find nothing in the record to indicate that any of the parties requested any such order and we deem it unwise to place this added burden on the Court; consequently we eliminate this requirement from the judgment and modify the judgment of the trial court to this extent. As so modified, the judgment of the trial court is affirmed. MR. JUSTICE FRANTZ not participating.

APPENDIX C

(Section 133 of Charter of City and County of Denver)

POLICE PENSION AND RELIEF FUND

133—Police pension and relief board. (Section 239) There is hereby created a "police pension and relief board" consisting of five members, who shall serve without compensation. Said board shall consist of the manager of safety and excise, a member appointed by the judges of the district court of the city and county of Denver, and three members of the Denver police department, in the classified service, who shall be elected by a secret ballot of all the members of the Denver police department, in the classified service. Members of the board shall be appointed and elected between June 1 and June 15, 1947, and between January 1 and January 15 of each succeeding year thereafter to serve for terms of one year, or until their successors have been appointed and duly qualified.

The "police pension and relief board" shall have exclusive control of all matters pertaining to the granting of relief to members of the Denver police department, in the classified service, who shall become sick or injured during their term of active service, and to the granting of pensions to the members of said department and their dependents at the termination of their active service with said department, in compliance with the provisions of this amendment. The decisions of said "board" shall be final and subject to review on appeal by the district court of the city and county of Denver.

There is also hereby created a committee for the investigation of pensions and relief, which shall consist of five members to be elected between June 1 and June 15, 1947, and between January 1 and January 15 of each succeeding year from the members of the Denver police department, in the classified service, by a secret ballot of all such members.

It shall be the duty of said committee:

(a) To investigate and submit reports to the board on all applications for pensions and relief under the provisions of this amendment and to investigate and report such other matters relative to pensions and relief as may be directed by the board.

(b) To investigate between January 1 and March 1 and to report to the board not later than March 15 of each year the status of all dependents of members of the police department who are receiving compensation under the amendment and to report immediately to the board whenever it shall come to the attention of the committee that any dependent has become ineligible for relief under the terms of this amendment.

(c) To investigate all relief cases and report to the board as often as may be necessary to enforce the provisions of this amendment.

(d) To petition the board to re-examine any relief cases in which it may appear that the provisions of this amendment are being violated.

RETIREMENT

Any member of the Denver police department in the classified service who shall have completed twenty-five years of active service in said department, shall, upon his request, be retired from further service in said department and such member shall thereafter, during his life-time, be paid in equal monthly installments from the "pension and relief fund" a pension equal to one-half ($\frac{1}{2}$) of the average monthly rate of salary which such member shall have received in such department during the one year preceding the date of the termination of the said member's twenty-five years of active service.

The pension herein provided for shall be paid to those who have been retired from service prior to the effective date of this amendment, as well as those who shall be so retired after the effective date of this amendment; provided,

however, that at no time shall the pension of any member be reduced to an amount less than the amount he was entitled to at the time he was retired from active service.

In the event that salaries in the Denver police department shall be raised after the effective date of this amendment those members of said department who shall have previously been retired from active service and who are receiving a pension shall be entitled to an increase in the amount of their pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired.

No member of the Denver police department shall be retired from active service or be granted a pension prior to the termination of said member's twenty-five years of active service.

Should any member of the Denver police department, who has served an aggregate of twenty-five years of active service, elect to remain in active service beyond the termination of such member's initial twenty-five years of active service and should it appear at any time after such date that such member is physically or mentally unable to perform his duties as a police officer the chief of police, upon recommendation of said member's commanding officer and the police surgeon may petition the "police pension and relief board" to call said member before said board for an examination into his physical and mental condition to ascertain his fitness for active service.

The board shall cause said member to be examined by three licensed, practicing physicians appointed by said board and should the board find from their recommendations together with such other facts as may be presented to said "board" by the "investigating committee" that said member is either or both physically or mentally unfit for active service the board may for the good of the department order him to be retired from active service on a pension as herein provided.

SICK LEAVE

Each and every member of the Denver police department in the classified service shall be allowed eighteen (18) days per year of sick leave with full compensation at his regular rate of pay, the unused portion of such sick leave to be accumulated until said member shall have a reserve of ninety (90) days of sick leave. At any time the accumulated reserve of sick leave shall exceed ninety (90) days, the days in excess of ninety shall be added to the member's annual vacation of fifteen days and the member shall receive full compensation at his regular rate of pay for said days as well as for his regular annual fifteen-day vacation period.

At the termination of said member's term of service with the Denver police department, for any reason, the said member shall receive compensation in full at his regular rate of pay for all accumulated sick leave due him at the termination of his service.

On the date on which this amendment shall become effective each member of the Denver police department having five full years or more of service in said department shall be credited with ninety (90) days of sick leave and shall receive from that date one and one-half ($1\frac{1}{2}$) days per month of sick leave, and each member of said department who has less than five full years of active service in said department shall be credited with one and one-half ($1\frac{1}{2}$) days of sick leave for each month of active service in said department prior to the effective date of this amendment and shall after that date receive one and one-half ($1\frac{1}{2}$) days of sick leave for each month of active service in said department.

Any member of the Denver police department in the classified service, who shall become so physically or mentally disabled by reason of sickness caused by the discharge of the duties of said member in said department that he is rendered unable to perform his duties in said department and who has exhausted his accumulated sick leave shall be

entitled to such additional disability leave as he may need at one-half of the salary for the rank which he holds in said department to be paid from the "pension and relief fund"; provided, however, that should such member be eligible for retirement on a pension, as herein provided, he shall not be entitled to receive such additional disability leave but, instead, shall be retired from active service when he has exhausted his accumulated sick leave; and provided further, that no member of said department whose sickness or injury is caused by improper or vicious conduct, or illegal or immoral acts or due to the use of alcohol or narcotic drugs shall come under the provisions of this amendment.

INJURY IN LINE OF DUTY

Any member of the Denver police department who shall become injured in line of duty shall be provided when necessary with hospitalization, doctors, surgeons, nurses, and medical care.

Any member of the Denver police department in the classified service, who shall become so physically or mentally disabled by reason of bodily injuries received in the discharge of the duties of said member in said department that he is rendered unable to perform his duties in said department, shall be granted any necessary leave or leaves of absence not to exceed one year at his full salary for the rank which he holds in said department, and shall be compensated from the regular police department payroll.

Should such member need additional leave of absence in excess of one year he may use his accumulated sick leave at full pay on the regular police department payroll and should said member still need additional leave of absence he may be granted said additional leave of absence at one-half of the salary for the rank he holds in said department to be paid from the "pension and relief fund"; provided, however, that should such member be eligible for retirement on a pension, as herein provided, he shall not be entitled to receive such additional disability leave, but instead shall

be retired from active service at the expiration of one year's leave of absence and his accumulated sick leave.

Compensation shall not be denied under this section, because the injury was not received on the tour of duty to which the member has been assigned, if it was received in the discharge of the duties of the member and if he conducted himself in a legal manner and in compliance with rules and regulations governing said department.

DEPENDENTS

Upon the death of any member of the Denver police department who was in active service or retired as herein provided, his widow shall be entitled to receive monthly benefits from the "pension and relief fund" equal to one-third of the salary of said member at the time of his death and an allowance of twenty dollars ($20.00) per month for the first dependent child under the age of seventeen (17) and ten dollars ($10.00) per month for each additional dependent child under the age of seventeen (17). Said benefits shall terminate upon death or remarriage. Should said member leave surviving him no widow, but dependent children under the age of 17, then the widow's benefits as above provided plus the additional allowances for each dependent child under the age of 17 shall be apportioned among the dependent children under the age of 17.

RELIEF FUND

There is hereby created a "police pension and relief fund" which shall be composed of money from the following sources:

1. All moneys received from fines imposed on the members of the police department for violation of law or the rules and regulations of the department.

2. All donations and gifts which may be made to said fund.

3. Each and every member of the Denver police department in the classified service shall contribute 3½% of his salary or of his compensation when on disability leave.

4. Any balance remaining from the appropriation to the police department at the end of each year.

5. The council shall annually appropriate a sufficient sum to carry out the provisions of this amendment.

The benefits provided for in this amendment shall be in addition to, and not in lieu of, any benefits that may be provided by any state compensation act.

This amendment shall become effective June 1, 1947, and shall apply to all members of the Denver police department in the classified service as of said date, to all members entering such service after said date, and to all members of said department who have been granted pensions heretofore.

(Amended May 20, 1947; previously amended May 15, 1906.)

134—(Section 240) Repealed by 133 (section 239).

135—Money unexpended invested—Treasurer custodian. (Section 241) Moneys remaining at the end of any fiscal year in this fund shall not be transferred, but shall be invested from time to time, in approved interest-bearing securities. The treasurer shall be the custodian of all moneys and securities provided for in this section.

(Charter, March 29, 1904.)

APPENDIX D
(Sections 1565-1583 of 1927 Municipal Code)
ARTICLE IV

Police Department Relief Fund

Police department relief fund—Creation of.

Section 1565. There shall be and is hereby created a police department relief fund which shall be administered by the manager of safety and excise of said city and county under such rules and regulations not inconsistent with the charter and ordinances of said city and county as now existing, or as may hereafter be adopted.

Manager of safety and excise trustee.

Section 1566. The said manager of safety and excise shall be the trustee of all moneys, securities and other property belonging to said fund and for his acts and omissions, as such trustee, he shall be liable upon his official bond.

Manager of revenue custodian.

Section 1567. The manager of revenue of said city and county shall be the custodian of all funds, securities and other property belonging to said fund and shall be liable upon his official bond therefor.

Manager of revenue hold property subject to order of manager of safety and excise.

Section 1568. The manager of revenue shall hold said moneys, securities and other property subject only to the written order of said manager of safety and excise as evidenced by the signature of the manager of safety and excise, and no order shall be made thereon without a record of the same being first made in the record book, which book shall be kept by the manager of safety and excise. The manager of revenue shall keep such books of account and record as the manager of safety and excise may prescribe. All books and accounts relating to said fund shall at all times be sub-

ject to inspection by the manager of safety and excise, or any person interested. Upon the expiration of his term of office the manager of revenue shall deliver to his successor all moneys, securities and other property, including books and records, belonging to said fund, and said manager of safety and excise shall do likewise as to his successor.

Who entitled to benefits.

Section 1569. No person shall be entitled to the benefits of any of the provisions hereof unless he now be or hereafter become an officer, member or employee of the police department of the City and County of Denver within the classified service of the civil service regulations, and the chief of police of the City and County of Denver, or a member of the immediate family of such person and dependent on him and without other means of support.

Power to fine officers, etc.

Section 1570. The manager of safety and excise shall have the power to fine any such officer, member or employe for any misconduct or breach of discipline or violation of the rules or regulations of the department and to collect the same or cause it to be withheld from any amount that is or may become due him.

What moneys to be paid into the fund.

Section 1571. There shall be paid into and credited to said fund money derived from the following sources:

1. All proceeds from sales of unclaimed property.

2. All moneys received from licenses upon dogs.

3. All moneys received from fines for carrying concealed weapons.

4. All moneys received from fines imposed upon the members of the police department for the violation of laws or the rules and regulations of the department.

5. Fifty per cent of all the moneys received from the licensing of automobiles.

6. Fifty per cent of rewards, fees and compensation for any extraordinary services of any member of the police department. *Provided*, that not to exceed fifty per cent of any rewards or compensations shall be allowed to the person performing the service for which such reward or compensation is paid.

7. All donations and gifts which may be made to said fund.

8. A monthly assessment of one per cent upon the monthly salary of such officer, member or employe, to be deducted and withheld therefrom.

9. The council shall annually, in the general appropriation bill, include a reasonable sum for said fund.

Money in fund not to be transferred.

Section 1572. Moneys remaining at the end of any fiscal year in said relief fund shall not be transferred to any other fund.

Fund—How invested.

Section 1573. The said fund shall be invested only in interest-bearing bonds of the United States, of the State of Colorado, or of a city of the first class in the United States, as determined upon and approved by the manager of safety and excise.

Relief—When beneficiary entitled to same and how much.

Section 1574. If any such officer, member or employe, while engaged in the line of his duties, shall suffer physical injury resulting in total disability, or such total disability shall be occasioned by external cause or by disease contracted while engaged in the line of his duties, or by both such external cause and such disease, and such person shall be thereby rendered unable to perform his duties as such officer, member or employe, or otherwise to support himself and family, he shall be retired from service, and instead of his salary from said department he shall be paid monthly from said fund an amount equal to one-half the average

monthly salary, now being paid or hereafter to be paid for the same class of service, which the retired member was performing during one year next before the time of such injury, so long as the existence of such disability may from time to time be attested to in writing by two regularly certified practicing physicians appointed by the manager of safety and excise for the purpose of ascertaining the condition of such officer, member or employe (provided, no benefits shall be paid or received under this section if the illness or disability results from the immoral conduct or immoral or intemperate habits of such officer, member or employe). The amount of benefits herein provided for are to be paid to those who have heretofore been retired from service, as well as to those who shall hereafter be so retired. *Provided,* that at no time shall such benefits be reduced to an amount less than the beneficiary was entitled to at the time he was retired from service. Ord. No. 118, 1919.

Disability—Permanent and temporary—Definition of.

Section 1575. No such officer, member or employe shall be deemed to be permanently totally disabled until after the expiration of sixty days from the time of suffering any injury, but for said period shall be deemed to be temporarily disabled only and paid his salary by said department in accordance with the charter in such case made and provided. In case, however, his disability continues after suffering any injury more than sixty days, he shall for such period in excess of said sixty days be conclusively deemed to be permanently disabled, provided his case otherwise be within the terms of this act.

Death of officer, etc.—Amounts of benefits paid and to whom.

Section 1576. If any such officer, member or employe die while in the service of said department (and such death is not the result of immoral conduct, or immoral or intemperate habits), leaving a family theretofore dependent upon him and then without other adequate means of support, the manager of safety and excise shall direct the monthly pay-

ment from said fund to the members of such dependent family, during the continuance of such dependent condition, a sum in accordance with the following schedule; but if the aggregate thereof in any case exceeds one-half of the average monthly salary received by such decedent during the year next before his death, then the payments in such case shall be proportionately abated. The schedule above referred to is as follows:

To the decendent's mother	$ 8.00
To the decendent's father	8.00
To each child under the age of 14 years, payable to the custodian thereof	8.00
To the widow until she marries	40.00

Old age benefits.

Section 1577. Any such officer, member or employe, who has attained the age of sixty years and has been in the service of the police department in the city and county, or included municipalities, for twenty years or more, may make application to be relieved from service, and if, on examination by two regularly certified and practicing physicians, appointed by said manager of safety and excise, the applicant shall be ascertained to be, by reason of infirmity or disability, unfit for the performance of his duties, and such facts be certified to the manager of safety and excise by such physicians, the manager of safety and excise shall grant such application, and, instead of his salary from the department, there shall be paid monthly from said fund to the applicant, an amount equal to one-half the average monthly salary now being paid or hereafter to be paid for the same class of service which the retired member was performing during one year next before the time of filing such application. The Manager of safety and excise may, in his discretion, retire any such officer, member or employe on the terms aforesaid, who has attained the age and has been in the service as aforesaid, and by an examination as aforesaid, may be ascertained to be unable to perform his duties, without application for relief from service having been made. The amount of benefits herein provided for are to be paid to those who

have heretofore been retired from service, as well as to those who shall hereafter be so retired. *Provided,* that at no time shall such benefits be reduced to an amount less than the beneficiary was entitled to at the time he was retired from service.

Ord. No. 118, 1919.

Beneficiary—Duties of.

Section 1578. The manager of safety and excise may, in his discretion, assign any officer, member or employe receiving benefits under any of the provisions hereof to the performance of such duties in the department as they might be capable of discharging, and in such cases the person so assigned shall receive as monthly benefits only the difference, if any, between the monthly compensation attached to the position to which he may be assigned, and one-half his average monthly salary during one year next before the time of his disability or infirmity.

Pro rate—When funds insufficient.

Section 1579. If at any time the money, security and other property to the credit of said fund be insufficient to make the monthly payments accruing hereunder, then the beneficiaries shall equally prorate until such time as the condition of such fund warrants the payment of their benefits in full. Arrearages of benefits for one year may be paid in any future year, and shall enter into and form part of the basis of distribution for such year, but shall not otherwise be preferred.

Fund—Always exempt from executions, etc.

Section 1580. No portion of said funds shall before or after its order for distribution be held, seized, taken or subjected to or detained, or levied upon by virtue of any attachment, execution, injunction, writ, interlocutory, or other order or decree, or any process or proceeding whatever, issued out of or by any court of this state, for the payment or satisfaction, in whole or part, of any debt, claim, demand or judgment against any beneficiary of said fund, but said fund shall be held and distributed for the purposes of this act and for no other purpose whatever.

Attorney—Give advice to manager of safety and excise, etc.

Section 1581. It shall be the duty of the city and county attorney to give advice to the manager of safety and excise in all matters pertaining to his duties and management of said fund whenever required. And he shall represent and defend said manager of safety and excise as his attorney in all suits or actions at law or inequity that may be brought against him, and bring all suits and actions in his behalf that may be required or determined upon by said manager of safety and excise.

Reports to council.

Section 1582. On or before the first Monday of November in each year the said manager of safety and excise shall report to the council as to the condition of said fund, and shall on or before the 15th day of January of each year, make a full detailed report to the council of receipts and expenditures on account of said fund for the preceding year.

Changes, etc.—Council may make.

Section 1583. The council shall have power at any time to change or repeal any of the provisions hereof, including those prescribing the terms, conditions and amounts to be paid to or from said fund, notwithstanding service in said department, or donation or payment into said fund of any amount by any such officer, member or employe or any other person.

APPENDIX E

(Judgment of Supreme Court of Colorado)

Police Pension and Relief Board and Edward O. Geer (substituted for Charles J. Lowen), James T. O'Donnell, Duane Borden, Timothy Crow (substituted for Harry Brofman, Harold A. Dill, and Morris A. Pade), and Ivan Eldber, as Members Thereof; Thomas G. Currigan (substituted for William H. McNichols) as Auditor of the City and County of Denver; and the City and County of Denver, a municipal corporation,

Plaintiffs in Error,

18267 *vs.*

Charles Behnke, Artie D. Davis, Raymond W. Fell, and Frank G. Knaus, on behalf of themselves and all other persons similarly situated,

Defendants in Error.

Error to the District Court of the City and County of Denver.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, the Court now being sufficiently informed in the premises, it is ordered and adjudged that the judgment of said District Court be modified in accordance with the views expressed in the opinion on file herein, and that as so modified; the judgment of the said District Court be, and it hereby is, affirmed.

APPENDIX F

(Order denying petition for rehearing)

Police Pension and Relief Board and Edward O. Geer, etc., et al.,

Plaintiffs in Error,

18267 *vs.*

Charles Behnke, et al.,

Defendants in Error.

Error to the District Court of the City and County of Denver.

The Court having considered the motion of the plaintiffs in error for a rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

POLICE PENSION AND RELIEF BOARD and EDWARD O. GEER (substituted for Charles J. Lowen), JAMES T. O'DONNELL, DUANE BORDEN, TIMOTHY CROW (substituted for Harry Brofman, Harold L. Dill, and Morris A. Pade), and IVAN ELDHER AS MEMBERS THEREOF: THOMAS G. CURRIGAN (substituted for William H. McNichols) AS AUDITOR of the City and County of Denver; and the CITY AND COUNTY OF DENVER, a municipal corporation;

Petitioners,

vs.

CHARLES BEHNKE, ARTIE D. DAVIS, RAYMOND W. FELL, and FRANK G. KNAUS, on behalf of themselves and ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

RESPONDENTS' BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

NO. 733

POLICE PENSION AND RELIEF BOARD, et al.,
Petitioners,

vs.

CHARLES BEHNKE, et al., etc.,
Respondents.

RESPONDENTS' BRIEF

Succinctly stated, this case submits the cause of a subdivision of the State of Colorado, i.e., a municipal corporation, and its officers who complain that they are deprived of property without due process of law by reason of an unfavorable interpretation placed by the Supreme Court of Colorado upon a provision of the Charter framed and adopted by petitioner City and County of Denver, itself.

Equally succinctly, that complaint can find no hearing in the United States Supreme Court for three reasons.

1. Petitioners have no standing to invoke the guaranties of the Fourteenth Amendment.

2. No Federal question is here involved.

3. Petitioners have not been denied "due process of law."

ARGUMENT

no standing

The protection of the due process clause of the Constitution of the United States does not embrace a state, state agency, or municipal corporation to protect it from an unfavorable or an erroneous interpretation by the local Courts of a statute, law, or ordinance which it has enacted and which it may at its pleasure repeal or modify. The due process clause of the Fourteenth Amendment by its very terms is limited to protect persons, natural or artificial from oppressive state action, but not to immunize the local government from the enforcement of its own statutes, laws, or ordinances. The clause prevents a state and its subdivisions from making or enforcing laws or engaging in conduct which would arbitrarily deprive any person of life, liberty or property. But the state and its agencies may not invoke the Fourteenth Amendment although they may be bound by the interpretation placed upon their own legislation by local Courts.

Sweeney vs. State (1929) 251 N.Y. 417; 167 N.E. 519, 520.

The mere interest of a public officer, as such, in contrast to an actual injury sustained by a natural person or a corporation through an invasion of personal or property rights, has never been deemed adequate to enable him to invoke the protection of the Fourteenth Amendment either against state action or with reference to an unfavorable interpretation of state or local law.

Columbus and G.R. Company vs. Miller (1931) 283 U.S. 96; 51 S.Ct. 392; 75 L.Ed. 861.
Pennie vs. Ries (1889) 132 U.S. 464; 33 L. Ed. 426; 10 S.Ct. 149.
Taylor vs. Beckham (1900) 178 U.S. 548; 44 L.Ed. 1187; 20 S.Ct. 890.
Tyler vs. Judges of Court of Registration 179 U.S. 405, 410; 45 L.Ed. 252; 21 S.Ct. 206.
Straus vs. Foxworth (1913) 231 U.S. 162; 58 L.Ed. 168; 34 S.Ct. 42.

Similarly municipal corporations have no standing to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator, the state, or its duly constituted courts.

Pawhuska vs. Pawhuska Oil Company (1919) 250 U.S. 394; 63 L.Ed. 1054; 39 S.Ct. 526.
Trenton vs. New Jersey (1923) 262 U.S. 182, 188; 67 L.Ed. 937; 43 S.Ct. 534.
Williams vs. Baltimore (1933) 289 U.S. 36; 77 L.Ed. 1015; 53 S.Ct. 431.

no federal question

The Constitution of the United States does not guarantee that the decisions of state courts shall be free from error, nor does the due process clause give the Supreme Court jurisdiction to review mere mistakes of law concerning local matters alleged to have been committed by a state court.

MacDonald vs. Oregon Railroad and Navigation Company (1914) 233 U.S. 665, 667; 58 L.Ed. 1145; 34 S.Ct. 772.

The decision of a state court upon a question of local law, however wrong, is not an infraction of the Fourteenth Amendment merely because it is wrong. It is not for the United States Supreme Court to determine whether there has been an erroneous construction of a state statute, nor does the Federal Constitution impose any impediment to the correction or modification by a state court of previous constructions of law embraced in earlier decisions.

> Patterson vs. Colorado ex rel Attorney General (1907) 205 U.S. 454 461; 51 L.Ed. 879; 27 S.Ct. 556.
> Standard Oil Company vs. Missouri ex rel Hadley (1912) 224 U.S. 270, 287; 56 L.Ed. 760; 32 S.Ct. 406.
> Stockholders vs. Sterling (1937) 300 U.S. 177, 182; 81 L.Ed. 586; 57 S.Ct. 386.

If the local law offends the state authority which enacted it, the obvious remedy is to pluck it out by repealing or amending it. Thus the objection would be obviated and Federal intervention unnecessary.

due process

This case involves solely the interpretation of a Charter provision. It would appear obvious that the Court in making such interpretation could consider any source for its reasoning that seemed desirable. In reviewing related ordinances the Court was no more considering "evidence not in the record" (p. 17 Opening Brief) than if it had consulted the dictionary.

Nor, as a reading of Appendix B reveals, was the overruling of the previous decision of the Court necessary to the present decision. The Court after stating plaintiffs' rights under the earlier ordinances, considers the later Charter Amendment, then concludes, "We find nothing in this amendment that purports to deprive plaintiffs of any rights previously granted." (p. 47, Opening Brief) The decision could have terminated upon this announcement as far as the rights of the respective litigants in the instant case are concerned.

The Court, however as it was free to do, chose to go further and reverse the earlier case. Neither the lower court s decision nor its affirmation in the Supreme Court of Colorado hinged upon such overruling, and necessarily there was no divesting of "defenses and rights accrued, vested, and in existence prior to such reversal * * * " (p. 19, Opening Brief), and no denial of due process.

conclusion

Petitioners concede there was no Federal question of substance or otherwise, presented in the case by the pleadings or the trial upon stipulated facts (p. 7, Opening Brief) Their only quarrel is with the reasoning and language of the opinion of the Supreme Court of Colorado. These, it is submitted, are not within the purview of the Fourteenth Amendment, even if petitioners were themselves properly addressed to its guaranties. Those guaranties pertain to the substance, not to the reasoning, of judgments. The judgment and

order here are no more burdensome than the prayer of the Complaint and the judgment of the trial court to which no Federal grounds of objection exist.

Since the decision of both state courts could have been reached, and that of the trial court was concededly reached without the alleged violation of constitutional rights, such decisions are not subject to review by the Supreme Court of the United States.

Certiorari should be denied.

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February 1958.